

# CRIMINAL YEAR SEMINAR

April 17, 2020  
Webinar



## Constitutional Law

Prepared By:

**The Honorable Dave Cole**

The Honorable Dave Cole, Retired Judge of the Maricopa County  
Superior Court; Senior Litigation Counsel  
Arizona Attorney General's Office

Distributed By:

**ARIZONA PROSECUTING ATTORNEYS' ADVISORY  
COUNCIL**

3838 N. Central Ave., Suite 850  
Phoenix, Arizona 85012

And

**CLE WEST**

5130 N. Central Ave  
Phoenix, AZ 85012

## 2019-2020 CONSTITUTIONAL LAW

Presented by

The Honorable Dave Cole,  
Retired Judge of the Maricopa County Superior Court;  
Senior Litigation Counsel, Arizona Attorney General's Office

1

### U.S. Const. amend. 4 Search and seizure — Legitimate expectation of privacy.

*Fuentes*, 247 Ariz. 516, 452 P.3d 746 (Ct. App. 2019):  
Police searched property that was in the name of  
Fuentes's son. Fuentes contended the trial court erred in  
find that he did not have standing to challenge the  
search.

**us.a4.ss.xp.010** An individual does not have automatic  
standing to challenge a search; an individual must have  
a legitimate expectation of privacy, *i.e.*, the individual,  
by conduct, must have exhibited an actual (subjective)  
expectation of privacy.

2

¶¶ 12–13: Trial court accepted as true Fuentes's avowal  
that he had: (a) purchased property to secure rental  
income; (b) placed it in name of his son, who was serving  
in military and to whom he planned to offer it upon his  
return; (c) purchased mobile home, placed it, too, in his  
son's name, and located it on property; (d) collected rental  
income from property; (e) worked on mobile home shortly  
before his arrest, including painting it, repairing roof, and  
acquiring permit to install septic tank;

3

(f) periodically slept or napped in mobile home when working on property; (g) possessed keys to mobile home and left it locked; and (h) left personal property, including two bedrolls and beer, inside; court held that, under totality of circumstances, it was abuse of discretion for trial court to find that Fuentes “did not have a legitimate expectation of privacy in this particular place”; admission of evidence found there was, however, harmless.

4

**U.S. Const. amend. 4 Search and seizure —  
Exigent circumstances — protective sweep.**

*Fuentes*: State contended search was lawful as a “protective sweep.”

**us.a4.ss.ec.ps.020** The Supreme Court has never articulated a “protective sweep” exception to the warrant requirement in the absence of a contemporaneous arrest.

5

¶¶ 15–18: Police went to property, approached mobile home there and found door open, called out to any potential occupants, received no response, and entered to perform what they termed a “security sweep”; court held that, because there was no contemporaneous arrest, search was not justified as protective sweep; admission of evidence found there was, however, harmless.

6

**U.S. Const. amend. 4 Search and seizure—  
Length of detention.**

*Angulo-Chavez*, 247 Ariz. 255, 448 P.3d 296 (Ct. App. 2019): Officer stopped Angulo-Chavez (AC) for speeding; after issuing warning, officer asked AC whether he would answer additional questions, and he agreed; officer became increasingly suspicious AC was engaged in illegal activity;

7

---

---

---

---

---

---

---

---

eventually, AC orally agreed to allow officer to search his vehicle and signed Spanish-language DPS consent-to-search form; officer found approximately 18 pounds of methamphetamine hidden in sealed packages behind panel in trunk. AC contended officer unlawfully extended the traffic stop in violation of his Fourth Amendment rights.

8

---

---

---

---

---

---

---

---

**us.a4.ss.ld.020** For a traffic stop, the duration of the officer's inquiries must extend only as long as necessary to effectuate the purpose of the traffic stop or any related safety concerns; after the original purpose of the stop has been resolved, the officer must permit the driver to leave without further delay or questioning unless: (1) during the traffic stop the officer gains a reasonable and articulable suspicion that the driver is engaged in illegal activity;

9

---

---

---

---

---

---

---

---

or (2) the encounter between the officer and the driver ceases to be a detention, but becomes consensual; if a driver agrees to answer additional questions after the conclusion of the traffic stop, he has not been “seized” under the Fourth Amendment and the consensual encounter may extend as long as a reasonable person would feel free to disregard the police and go about his or her business.

10

¶¶ 6–10: Court held trial court did not abuse discretion in finding continuation of original encounter was consensual and reasonable and did not constitute seizure under Fourth Amendment, thus resulting search of AC’s vehicle was consensual and lawful.

11

**U.S. Const. amend. 4 Search and seizure—  
Search of a person on probation or parole.**

*Lietzau*, 246 Ariz. 380, 439 P.3d 839 (Ct. App. 2019): Lietzau was on **probation** with written conditions that he would submit to search and seizure of person and property by Adult Probation Department without search warrant; 4 months later, woman told Lietzau’s probation officer she believed Lietzau was having an inappropriate relationship with her 13-year-old daughter (S.E.);

12

few weeks later, probation officer arrested Lietzau for violating conditions of probation (failure to provide access to his residence, participate in counseling programs, comply with drug testing, and perform community restitution); on way to jail, officer examined Lietzau's cell phone and saw numerous text messages between Lietzau and S.E.;

13

---

---

---

---

---

---

---

probation department reported these findings to police department, and detective then obtained search warrant and discovered incriminating photos and text messages in phone; Lietzau was subsequently indicted on charges of sexual conduct with minor. Lietzau contended a warrant was required for a search of a cell phone, and further contended the search was unreasonable.

14

---

---

---

---

---

---

---

**us.a4.ss.pop.010** As long as the conditions of release authorize such a search, a warrantless search of a person on **parole** may be conducted even without reasonable suspicion; for a person on **probation**, the search must be reasonable under the totality of the circumstances, which requires that the search be conducted by a probation officer in a proper manner and for a proper purpose in determining whether the probationer is complying with the probation obligations.

15

---

---

---

---

---

---

---

¶¶ 11–19: Court held that, under totality of circumstances, including Lietzau’s significantly diminished privacy rights as probationer, his acceptance of search conditions when he agreed to probation, which arguably included his cell phone, probation department’s well-grounded suspicion that Lietzau might be involved in serious offense with adolescent child, and well-known use of cell phones as aid in committing sexual offenses against children, officer’s search of Lietzau’s cell phone was reasonable, thus trial court abused its discretion in granting Lietzau’s motion to suppress.

16

**U.S. Const. amend. 5 Self-incrimination—Voluntariness.**

*Champagne*, 247 Ariz. 116, 447 P.3d 297 (2019): Champagne was convicted of first-degree murder; on March 3, Champagne was arrested for unrelated crimes and invoked his *Miranda* rights; while he was in custody for those unrelated crimes, a detective posed as an unscrupulous private investigator and discussed with Champagne his need to hide the bodies; after Champagne told detective that, if police found the bodies, “he would face the death penalty because of his criminal past,” police found the bodies, and on March 8, state charged Champagne with murder; Champagne contended his statement was not voluntary.

17

**us.a5.si.vol.040** A confession will be found involuntary if (1) the officers engaged in impermissible conduct, or (2) the officers exercised coercive pressure that was not dispelled, or (3) the confession was derived from a prior involuntary statement.

¶¶ 37–39: Court held trial court properly concluded there was nothing coercive about police conduct at issue and that state’s conduct was neither shocking nor fundamentally unfair, and further stated no constitutional protections exist for “a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”

18

**U.S. Const. amend. 5 Self-incrimination—*Miranda*.**

Champagne contended his statement was taken in violation of *Miranda*.

**us.a5.si.mir.030** The purpose of *Miranda* was to protect a person from a “police dominated atmosphere,” thus even if a person is in custody, if that person speaks voluntarily to someone the person believes is not a police officer, *Miranda* does not apply.

19

---

---

---

---

---

---

---

¶¶ 29–36: Court held that, because Champagne was unaware he was speaking to detective, there was no “police-dominated atmosphere” requiring *Miranda* warning; further, although on March 3 Champagne had invoked his *Miranda* rights, his subsequent statements to detective did not violate Fifth Amendment because conversations between suspects and undercover agents do not implicate concerns underlying *Miranda*, thus, trial court properly ruled no Fifth Amendment violation occurred.

20

---

---

---

---

---

---

---

**U.S. Const. amend. 6 Counsel—Pre-charging.**

Champagne contended the detective violated his Sixth Amendment right to counsel because he invoked that right on March 3;

**us.a6.cs.pcg.020** The Sixth Amendment right to counsel is offense-specific, such that incriminating statements pertaining to other crimes, for which the Sixth Amendment right has not yet attached, are admissible at a trial of those offenses.

21

---

---

---

---

---

---

---



¶¶ 40–41: Court held that, because Champagne was not charged with present offenses until March 8, his invocation of his Sixth Amendment right to counsel on March 3 did not preclude admission of his statement.

22

---

---

---

---

---

---

---

**U.S. Const. amend. 5 Self-incrimination—Miranda.**

*Sallard*, 247 Ariz. 464, 451 P.3d 820 (Ct. App. 2019): Prior to Sallard’s arrest, officer saw her using a cell phone; after Sallard was arrested, she invoked her *Miranda* rights; at some point after that, officer asked Sallard if she would consent to search of her cell phone, and Sallard signed written consent; Sallard contended evidence from her cell phone was obtained in violation of her constitutional rights

23

---

---

---

---

---

---

---

**us.a5.si.mir.040** Once a person is in custody, the *Miranda* warnings are a prerequisite only for the introduction of evidence that is testimonial in nature, thus the failure to give *Miranda* warnings does not preclude admission of non-testimonial evidence.

¶¶ 7–15: Court noted Sallard had only asked to remain silent and that she had never asked for attorney, and further noted request for consent to search is neither testimonial nor communicative, even though evidence uncovered may itself be highly incriminating, thus trial court did not err in denying Sallard’s motion to suppress.

24

---

---

---

---

---

---

---

*Klos*, 248 Ariz. 40, 455 P.3d 739(Ct. App. 2019): Klos was native Thai speaker who began to learn English when she moved to United States in 1975; she told detective she had difficulty understanding “hard words” but she could read and write in English at 10<sup>th</sup>-grade level and had passed a cosmetology test in English. Klos contended that trial court erred in finding that she understood the *Miranda* warnings.

25

---

---

---

---

---

---

---

---

**us.a5.si.mir.260** Poor linguistic abilities, standing alone, do not invalidate an otherwise knowing and intelligent waiver; to determine whether a defendant has validly waived the *Miranda* rights, the trial court must examine the totality of the circumstances surrounding the interrogation, which includes the defendant’s background, experience, and conduct, and to evaluate whether a non-native English speaker validly waived the rights, the trial court may consider such factors as

26

---

---

---

---

---

---

---

---

(1) whether the defendant signed a written waiver; (2) whether the defendant was advised of the rights in the defendant’s native tongue; (3) whether the defendant appeared to understand the rights; (4) whether the defendant had the assistance of a translator; (5) whether the defendant’s rights were individually and repeatedly explained to the defendant; and (6) whether the defendant had prior experience with the criminal justice system.

27

---

---

---

---

---

---

---

---

¶¶10–18: Court concluded there was substantial evidence that supported trial court’s finding that Klos was “fairly conversant” in English

28

---

---

---

---

---

---

---

**U.S. Const. amend. 5 Double jeopardy—  
Collateral estoppel and res judicata.**

*Crosby-Garbotz v. Fell*, 246 Ariz. 54, 434 P.3d 143 (2019): State charged Crosby-Garbotz (CG) with child abuse based on injuries to child; in separate previous dependency action, juvenile court found CG did not abuse child in question and dismissed dependency petition that was based solely on that alleged abuse. CG contended state was precluded from bringing criminal charges against him.

29

---

---

---

---

---

---

---

**us.a5.dj.ce&rj.040** Issue preclusion may apply in a criminal proceeding when an issue of fact was previously adjudicated in a dependency proceeding and the other elements of preclusion are met.

¶¶ 1, 17–21, 26: Court concluded policy concerns did not justify absolute bar to applying issue preclusion; court applied issue preclusion and held state’s failure to prove child abuse in dependency action precluded state from bringing criminal charges based on same conduct.

30

---

---

---

---

---

---

---

**U.S. Const. amend. 6 Counsel—  
Ineffective assistance of counsel; Standards.**

*Nunez-Diaz*, 247 Ariz. 1, 444 P.3d 250 (2019): Nunez-Diaz (ND) was an undocumented immigrant who entered into guilty plea that resulted in his mandatory deportation. ND contended his attorney provided ineffective assistance of counsel.

31

---

---

---

---

---

---

---

---

**us.a6.cs.iac.001 & .012** To prevail on a claim of ineffective assistance of counsel, the defendant must show (1) counsel's representation fell below an objective standard of reasonableness, focusing on the practice and expectations of the legal community, *i.e.*, that counsel's performance was not reasonable under prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

32

---

---

---

---

---

---

---

---

¶¶ 10–16: Court held ND's attorney provided ineffective assistance of counsel in failing to advise him of the result of his plea, and further held that, because the record showed ND would not have entered into plea if he had known he faced mandatory deportation, ND established prejudice.

33

---

---

---

---

---

---

---

---

**U.S. Const. amend. 8 Cruel and unusual punishment.**

*Kasic*, 247 Ariz. 562, 453 P.3d 1151 (Ct. App. 2019): Kasic was convicted of 32 felonies arising from series of arsons spanning 1-year period, some of which he committed while he was under the age of 18; his combination of concurrent and consecutive prison terms totaled nearly 140 years. Kasic contended that his consecutive prison terms were unconstitutional because they collectively constituted sentence of life without possibility of parole.

34

---

---

---

---

---

---

---

---

**us.a8.cu.110** In determining proportionality, courts usually do not consider the imposition of consecutive sentences.

¶¶ 2–5: Court rejected Kasic’s contention that his consecutive prison terms were unconstitutional because they collectively constituted sentence of life without possibility of parole.

35

---

---

---

---

---

---

---

---

**U.S. Const. amend. 14 Due process—Charging process.**

*Dansdill*, 246 Ariz. 593, 443 P.3d 990 (Ct. App. 2019): State charged Dansdill with second-degree murder; almost year later, state obtained second indictment charging Dansdill with two counts: (1) first-degree felony murder, “or in the alternative,” second-degree murder; and (2) attempted armed robbery. Dansdill filed motion to dismiss claiming vindictive prosecution.

36

---

---

---

---

---

---

---

---

**us.a14.dp.cp.010** It is within the sound discretion of the prosecutor to determine whether to file criminal charges against a particular person, which charges to file, and which allegations to file, subject to certain limitations, such as not penalizing the person for invoking a legally-protected right.

¶¶ 6–17: Prosecutor explained state obtained second indictment in response to defense theory that became apparent during pretrial interviews; court found no abuse of discretion in trial court’s denial of Dansdill’s motion to dismiss for vindictive prosecution.

37

---

---

---

---

---

---

---

---

**U.S. Const. amend. 14 Due process—  
Identification procedures.**

*Hernandez*, 246 Ariz. 543, 443 P.3d 33 (Ct. App. 2019): officer saw car run a stop sign, which caused him to swerve to avoid collision; officer attempted traffic stop, but car did not stop, which resulted in pursuit that eventually ended in parking lot, where driver and two other occupants fled. Hernandez contended the trial court erred in not precluding the officer’s pre-trial and in-court identifications.

38

---

---

---

---

---

---

---

---

**us.a14.dp.id.060** To establish a due process violation, a defendant must establish that the identification is not otherwise reliable, which will depend on (1) the witness’s opportunity to view the person, (2) the witness’s degree of attention, (3) the accuracy of the witness’s prior description, (4) the witness’s level of certainty at the confrontation, and (5) the length of time between the crime and the confrontation.

39

---

---

---

---

---

---

---

---

¶¶ 9–12: Court noted officer had opportunity to view Hernandez’s face, “lock[ing] eyes” with him, as he swerved to avoid a collision; although officer viewed Hernandez briefly, his full attention was on his face during the near collision; officer also saw Hernandez’s profile as he fled on foot from car;

40

within 3 minutes of Hernandez’s fleeing, officer saw photograph and recognized Hernandez; further, officer testified he was “[v]ery certain” in his identification of Hernandez and that he would have been able to identify him in court without having first viewed the photograph; court held record adequately supported trial court’s finding that officer’s identification was sufficiently reliable to be presented to jurors, thus trial court did not abuse its discretion in admitting identification.

41

**Ariz. Const. art. 2, sec. 2.1(A)(8).**

**Victim’s rights — Right to receive restitution.**

*Quijada*, 246 Ariz. 356, 439 P.3d 815 (Ct. App. 2019): Quijada pled guilty to trafficking in stolen property, victim submitted unsworn restitution statement that contained items not reported in police report; as proceedings progressed, victim submitted amended restitution statements, each one claiming more items than in previous statements; although trial court attempted to hold restitution hearing, it was unable to do so because victim did not appear, but entered restitution order for \$40,885.42.

42

**az.2.2.1.a.8.070** When events or circumstances call the veracity or accuracy of evidence concerning restitution into doubt, and the defendant cannot adequately challenge that evidence without questioning the victim in open court under oath, due process requires that the defendant be given the opportunity to do so.

¶¶ 29–34: Court held entering restitution order without allowing Quijada to question victim about items she claimed were stolen deprived Quijada of due process; court vacated restitution order and remanded for hearing to give victim the opportunity to testify.

43

---

---

---

---

---

---

---

---

**Ariz. Const. art. 2, sec. 15. Cruel and unusual punishment.**

*Healer*, 246 Ariz. 440, 440 P.3d 404 (Ct. App. 2019): In 1994, at age of 16, Healer robbed and murdered his elderly neighbor; jurors found him guilty, and trial court sentenced him to life imprisonment without possibility of release; court affirmed his convictions and sentences on appeal; Healer sought post-conviction relief, and supreme court held he was entitled to be resentenced; trial court resentenced him to life imprisonment with the possibility of parole after 25 years.

44

---

---

---

---

---

---

---

---

**az.2.15.cu.010** There is nothing in the language of the Arizona Constitution, or in the opinions interpreting that language, to indicate that the Arizona Constitution gives a defendant any greater rights against cruel and unusual punishment than does the United States Constitution.

¶¶ 10–12: Court rejected Healer’s claim that children who are tried as adults must not be sentenced as though they were adults and that subjecting children to same mandatory sentences as adults is disproportionate.

45

---

---

---

---

---

---

---

---